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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL., - - - - - - - Respondents.

BRIEF FOR PETITIONERS.

J. V. NORMAN,

Counsel for Petitioners.

Dated at:

Louisville, Ky.,

November 23, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD CO.,
ET AL., - - - - - - - - *Respondents.*

BRIEF FOR PETITIONERS.

OPINION OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals, which is here under review, is reported in 82 Fed. (2d) 94 (R. 74-79). The opinion of the United States District Court for the Western District of Kentucky, which was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, is reported in 7 Fed. Supp. 593 (R. 65-67). The opinions of the Interstate Commerce Commission construing the tariff rule and awarding the reparation, here sought to be recovered, are reported in 142 I. C. C. 521 (R. 40-54), and 182 I. C. C. 731 (R. 13-24).

STATEMENT OF JURISDICTION.

The case is here on writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, granted by this Court on October 12, 1936.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to review a judgment of that Court affirming a judgment of the District Court for the Western District of Kentucky dismissing, upon demurrer and refusal of the plaintiff to plead further, the petition of the plaintiffs, as amended, against the Louisville & Nashville Railroad Co., and other carrier defendants, which sought a judgment of $14,972.27, with interest, upon an award of reparation of the Interstate Commerce Commission.

The question involved, when originally presented to the Interstate Commerce Commission, was one partially adminstrative and partially judicial, but as presented to the Court below was one of law only, which, when decided, would decide the entire case; and consequently the demurrer was treated by the District Court as disposing of the case and suit was dismissed on the ground that the petition, as amended, stated no cause of action.

The question originally presented to the Interstate Commerce Commission was one of tariff construction

and application. There is now presented the additional question as to whether the decision of the Interstate Commerce Commission is here controlling. Specifically, the question of tariff construction involves the question whether the so-called "Combination Rule" should or should not be applied where there was no published through (joint) rate from point of origin to point of destination over the route the consignment moved, or should have been shipped, or was billed to be shipped, although there was a joint through rate over some other route from point of origin to point of destination.

The origin and purpose of the rule, together with the rule itself and explanation of its application, is set forth by the Interstate Commerce Commission in its original report herein, as follows (R. 45-46):

> "The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect. It reads in part as follows:
>
> "'Where no published through rates are in effect from point of origin to destination on lumber and articles taking same rates, or arbitraries over lumber rates, also other forest prod-

ucts, on which rates are not higher than on lumber, carloads, and two or more commodity rate factors are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner (either where such commodity rate factors cover entire haul from origin to destination, or where used in connection with one or more class rate factors):'

"The formula which follows provides that the separately established commodity rate factors, except where they do not aggregate more than 30 cents, should be reduced by amounts ranging from 0.5 cents for factors under 4 cents to 6 cents for factors 29 cents or over, and that 6 cents should be added to the sum of all factors. This rule has remained substantially the same since its first publication in February, 1919, except that arbitraries and other amounts shown therein were increased on December 1, 1920, and reduced on July 1, 1922, to reflect the general increase and reduction.

"The joint rates on lumber from and to the points here considered rarely exceeded the combination rates over other routes even when reduced by the use of the combination rule, until after the general increase of 1920. Owing to the variance in the percentage increases in rates authorized within and between the territorial groups, 25 per cent south of the Ohio River, 40 per cent north thereof, 35 per cent west of the Mississippi River, and 33-1/3 per cent in the interterritorial joint rates, the formula did not produce exact results, but, as effective December 1, 1920, was designed to

increase combination rates approximately 33-1/3 per cent."

For several years, in fact until 1923, the carriers, the shippers and the Interstate Commerce Commission (hereinafter called Commission) construed this rule to mean that the combination rate factors treated by the rule, not the full factors, applied where there was no through joint rate from point of origin to point of destination over the route used, or which should have been used if the shipment were unrouted, although there was a published through joint rate over some other route, the construction now contended for by the plaintiffs (R. 39). In 1923, for the first time, the Southern carriers took the position that this rule meant that the full factors in the combination over route of movement had to be charged where there was a through joint rate via *any route* from point of origin to point of destination, and assessed charges accordingly, resulting in the overcharges for which an award was made to the plaintiffs here by the Commission (R. 39). The result is that where the Combination Rule was not applied a shipment moving over a route via which there was no joint rate received a double advance owing to the use of the full factors, each of which had been increased.

In 1923 the carriers filed with the Commission an amendment to the tariff, whereby they proposed to restrict the application of the so-called "Combination Rule" for constructing lumber rates from the Mississippi Valley and Southeastern points of origin to Ohio

and Mississippi River crossings when the shipments are destined for points beyond these crossings, by inserting in the rule the words "via any route," which they now contend are to be read into the rule. The Commission suspended said amendment to the tariff and, after hearing, declined to permit same to become effective, and ordered same to be cancelled. The Commission's reports, so holding, are found in 81 I. C. C. 745, and in 93 I. C. C. 614. The carriers nevertheless proceeded to assess charges as though said words had been included in the rule (R. 39).

The contention of the parties may best be illustrated by reading the rule with the contention of each party shown in parentheses, as follows:

> "Where no published through rates are in
> carrier shipper
> effect (via any route) (via route of shipment)
> from point of origin to point of destination, * * *."

A further addition is necessary, however, in order to show correctly the carriers' contention, since they concede the through route must be one to which the initial carrier is a party, and therefore they contend the rule should be interpreted as though it read:

> "Where no published through rates (to which the initial carrier is a party) are in effect (via any route) from point of origin to point of destination, * * *."

STATEMENT OF FACTS.

As the case below turned upon demurrers to the petition, as amended, and to the answer, as amended, the entire substantive record consists of these pleadings, with the exhibits filed with each. These pleadings, however, set forth the entire case, which may be summarized as follows:

1. PETITION AS AMENDED: This was a suit originally filed in the District Court for the Western District of Kentucky by W. P. Brown & Sons Lumber Co., and other plaintiffs, against the Louisville & Nashville Railroad Co., and other carrier defendants, seeking, in the first instance, a judgment of $32,974.77, upon an award of the Commission. The suit was filed under authority of Section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, U. S. C. A., Title 49, §16 (R. 1-12). Later the judgment sought was reduced to $14,972.27, with interest, by reason of settlements, and payments made by certain of the defendants on a part of the awards (R. 1-12; 35-40).

Before bringing the suit in the District Court, the plaintiffs first made application to the Commission for reparations in complaints filed with the Commission, numbered 17,068, 17,858, 17,224, 17,298, 17,407 and 17,957. These complaints were filed between April 11, 1925, and January 21, 1926 (R. 8-9; 42), and were heard April 23 and 24, 1926, and decided May 8, 1928, and February 9, 1932. In these reparation complaints

before the Commission, the plaintiffs pleaded the issuance of the Combination Rule, its construction up until 1923, the change then made by the defendants, southern carriers, which proceeded to charge the full combination rate without application of the Combination Rule in cases where there was a through joint rate *via any route;* and that any charge made by the defendant, in such instance, in excess of the combination rate, reduced by application of the Rule, was illegal, for which reparation should be made (R. 1-12).

The cases before the Commission then went to issue, proof was taken on the application of the tariffs, on the shipments made, and the charge made therefor by the defendants, and the Commission then rendered its first report on May 8, 1928 (R. 40-54). This report appears in 142 I. C. C. 521. In it the Commission pointed out:

(1) That the shipments may be divided into three classes (a) those specifically routed by plaintiffs over routes where there was no through joint rate; (b) those tendered to defendants unrouted, which should have moved over routes where the combination rate applied rather than the through rate and (c) those forwarded over initial carriers not participating in joint through rates from point of origin to point of destination;

(2) That, as it had always held, all ambiguities in a tariff must be construed against the carrier; and

(3) That it had theretofore repeatedly held that the combination rate applied over route of shipment if there was no joint through rate over this route, even though there was a joint through rate over another route from point of origin to point of destination.

Based on this the Commission found (R. 49-50):

(1) That the applicable rates were those over the route of movement and if there was no through rate over such route, the combination rate, as reduced by the combination rule, applied and any charges in excess, in such cases, were overcharges;

(2) That where the shipments were delivered with routing instructions over routes where there was no joint through rate, and the shipments were forwarded over another route, there was a misrouting and the plaintiffs were damaged to the extent of any overcharges by reason of such misrouting; and

(3) That where the shipments were delivered with no routing instructions, or incomplete instructions, it was the duty of the defendant carriers to forward over the cheapest route, and any variance from this constituted a misrouting, and the plaintiffs were damaged to the extent of any overcharges resulting therefrom.

The entire matter was again reviewed before the Commission, which made a second report on February 9, 1932, 182 I. C. C. 731 (R. 13-24). In this report the Commission reviewed the case, adhered to its findings

in the former report, and entered an order directing the carriers to pay the plaintiffs, the various amounts tabulated in the order, on or before April 28, 1932 (R. 24-27). Some of the carriers, defendants herein, failed to do this and this suit was filed on February 6, 1933, based upon the order of the Commission.

2. THE ANSWER AS AMENDED: The answer of the defendants and amendments thereto, may be found in the record, pages 27-34, 54-62. The first paragraph of this answer consists of denials of certain allegations in the petition, which, however, need not be considered because the case turned on demurrer, and, under settled rules of construction, all allegations in the petition must be taken as admitted.

The second paragraph of the answer pleads affirmatively, and in a general way, that the order of the Commission, on which this suit is based, is invalid because it does not contain sufficient findings of fact. Neither the District Court nor the Circuit Court of Appeals considered this point, but decided that the demurrer to the petition, as amended, must be sustained.

The third paragraph pleads affirmatively that, as a matter of law, the Commission erred in construing the Combination Rule to apply where there was no joint through rate via route of shipment, if there was a joint through rate over *any route* from point of origin to point of destination. A demurrer was filed to this paragraph by the plaintiffs. which squarely raised the issue at law, decided by the Courts below.

3. THE ADOPTION, EFFECT AND HISTORY OF THE "COMBINATION RULE" (R. 38-39): Originally rates on lumber from the Pine Belt, in southern territory, to points north of the Ohio River, were published as separate factors, and the through rate was arrived at by adding these separate factors. Later these combinations were checked out and in many instances the lowest combination was published as the through rate via designated routes. In 1918, by General Order No. 28, the Director General increased the rates on lumber 25%, subject to a maximum increase of 5 cents per 100 pounds in any rate. In order to observe this maximum when through rates were made on combination, the Director General published the Combination Rule. Briefly stated, the rule provided that where combination rates on lumber aggregated more than 25 cents, each factor was to be reduced 20%, subject to a maximum reduction of 5 cents on any one factor with the addition of the flat amount of 5 cents per one hundred pounds to the sum of the factors so reduced.

At that time the rule had little application on lumber shipped from the South to north of the Ohio River, because under the 1918 general advance of the Director General the percentage increase in the South, in the north and between these territories was 25%. It came into application generally in 1920 by reason of (a) a 25% increase in rates in the south, (b) a 40% increase in rates in the north, and (c) a 33⅓% increase in the overhead rates, authorized by the Commission, in *Ex Parte 74,* 58 I. C. C. 220. This rule had applica-

tion through various changes in rates not necessary to outline here.

For several years after 1920, the carriers applied the Combination Rule to shipments of lumber from the South, or made refunds if not applied. In 1923 the southern carriers, for the first time, took the position that the rule did not apply in cases where there was a through joint rate by any route, and undertook to amend their tariffs to this effect, but the Commission declined to permit this amendment, on the ground, among others, that it would increase rates by routes which it held to be reasonable routes that should be kept open, 81 I. C. C. 745, 93 I. C. C. 614.

Notwithstanding the ruling of the Commission, the southern carriers continued to refuse to apply the rule, which resulted in these reparation complaints before the Commission, which are the basis of this suit.

4. DEMURRERS: A demurrer was filed by the defendants, to the petition, as amended (R. 63); and the plaintiffs filed a demurrer to paragraphs II, III and IV of the answer (R. 64-65).

5. OPINION OF THE DISTRICT COURT: In a memorandum opinion (R. 65-67) the District Court held that the Combination Rule was unambiguous, that the question presented was one of law and the decision of the Commission, while entitled to respect, was not binding or controlling upon the courts; that the rule plainly meant that it was not to be applied where there was a through joint rate via any route from point of origin to point of destination. The District Court

cited no authority and totally disregarded (1) the construction placed on the rule by the Commission, (2) the construction placed on the rule by the defendants themselves until 1923, and (3) the decision of the Court of Appeals of the District of Columbia in *B. & O.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488. Thereupon an order was entered (R. 67) sustaining the demurrer to the petition, as amended, and dismissing the suit. From this order appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

6. OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS: In its opinion (R. 74-79), the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, held that the rule did not apply where there were joint through rates *via any route* although there was no joint through rate via the route of movement and although both tariffs publishing combination rates incorporated the Combination Rule by reference thereto. In reaching this conclusion the Circuit Court of Appeals held that the question involved was one of law and since it does not involve the exercise of administrative discretion, the Court was not bound by the decision of the Commission; that there was no ambiguity in the rule; that the Court was unable to follow the reasoning of the Court of Appeals of the District of Columbia in *B. & O.* v. *Domestic Hardwoods, Inc., supra,* and that the contemporaneous construction of the railroads and the shippers and the Commission should not be permitted to defeat the clear language of the rule.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

In the brief of petitioners in support of the application for writ of certiorari there is set out, as required by the rules, a specification of errors intended to be urged if the review be granted. This specification is as follows:

"We would, upon review, contend that the Court of Appeals for the Sixth Circuit erred:

"1. In holding that the tariff rule in question was not applicable where there was a through joint rate between point of origin and destination *via any route.*

"2. In failing to hold that the tariff rule in question was applicable unless there was a through joint rate *via route of movement.*

"3. In holding that the construction and application of the tariff rule in question by the Interstate Commerce Commission involved no administrative question and was entitled to no weight.

"4. In failing to give proper or any weight to the contemporaneous construction of the tariff rule in question, as made for many years by carriers and shippers and by the Interstate Commerce Commission.

"5. In holding that the decision of the Court of Appeals of the District of Columbia, in *Baltimore & Ohio* v. *Domestic Hardwoods, Inc.,* 65 Fed. (2d) 488, was unsound and in refusing to follow same."

SUMMARY OF ARGUMENT.

1. Preliminary resort to the Commission in this case was not only proper but necessary. This is so because interpretation and application of the Combination Rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another, (b) the reasonableness of a practice of routing as between higher and lower-rated routes, and (c) uniformity in the application of rates, which is the paramount purpose of the Commerce Act.

2. Preliminary application to the Commission having been necessary, its decisions must be sustained unless clearly contrary to law.

3. The construction by the Commission should be sustained because it has long been declared and applied and has become a settled administrative construction.

4. The rule that in doubtful cases, in the construction of a tariff, the Court will consider how the rates claimed would operate as a matter of justice, requires that the Commission's construction be sustained.

5. The Commission should be upheld because the tariff provision, here in question, was contemporaneously construed by all interested parties as here construed by the Commission.

6. Any ambiguity or doubt as to the meaning of the tariff in question must be resolved against the carriers.

7. Response to the Defendants' plea that the "Combination Rule" cannot be applied over routes

where such application would result in a violation of the long-and-short haul provision of the Act.

8. The decision of the Circuit Court of Appeals of the District of Columbia, in *B. & O. R. R. Co.* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 448, is sound and should be sustained.

9. The cases of *Hohenberg* v. *L. & N.* (C. C. A. 5), 46 Fed. (2d) 952, and *Wheelock, et al.*, v. *Walsh Fire Clay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, relied upon by respondents, are not in point here.

PRELIMINARY RESORT TO THE COMMISSION WAS NOT ONLY PROPER BUT NECESSARY.

That it was proper to make original application to the Commission rather than to the Court is not challenged by the respondents and, of course, cannot be since Section 9 of the Interstate Commerce Act, as amended (U. S. C. A., Title 49, Sec. 9), specifically provides that any person claiming to be damaged by any common carrier, subject to the provisions of the Interstate Commerce Act, may either make complaint to the Commission or bring suit in any District Court of the United States of competent jurisdiction. Respondents take the position, however, that preliminary application to the Commission was not here necessary since, as they contend, the question presented involves no question of fact or law calling for the exercise of administrative functions.

We insist, however, that such questions were involved and that, moreover, the entire situation re-

quired the judgment of a tribunal that was familiar with the historical background which gave rise to the tariff rule in question, with the relation of such tariff rule to other tariffs and the effect of its interpretation upon the closing of routes as well as the necessity of of keeping such routes open.

The Circuit Court of Appeals recognized that resort to the historical setting which gave rise to the rule was necessary to a proper interpretation and application of the rule. It begins its opinion with the statement that the controversy is between shippers of lumber and carriers in respect to the construction of a rule in freight tariffs and that "an understanding of the point in dispute requires exposition of its historical setting" (R. 74). It then proceeds to set forth this historical setting at great length, leaving out of its review thereof, however, two of the most important facts which are (a) that the contemporaneous construction of both shippers and carriers was in accord with the construction of the Commission, and (b) that in 1923 the carriers made application to the Commission for authority to amend the tariff so as to make it read as they now contend it should be interpreted to read, and the Commission refused to permit such an amendment. The fact that "an understanding of the point in dispute requires exposition of its historical setting" in itself is conclusive that the question goes beyond the mere interpretation of the ordinary meaning of words.

Not only was an understanding of the historical setting required, but also an understanding of the result

of adopting the interpretation for which the opposing parties contended. The interpretation for which the carriers contended would result in closing commercially the routes by which the combination rates applied. It is true these routes would still be legally open, but, inasmuch as, in the absence of the application of the Combination Rule in constructing the rates, such rates would be higher than the rates via other routes, these routes would be closed commercially. Both the Commission and this Court have recognized that a route may be legally open and yet commercially closed. In *Western Pacific R. Co.* v. *Northwestern Pacific R. Co., et al.*, 191 I. C. C. 127, the Commission said (130):

> "While complainant's route is legally open and shippers may, under the tariffs, route shipments between Northwestern Pacific points and eastern defined groups over complainant's line, the combination rates effectively bar such movements, and that route may be said to be commercially closed. Although some trans-continental traffic has moved over its line and the route is technically open, it is not in effect a desirable open through route, as its availability is contingent upon the payment of combination rates which exceed the joint rates applicable over other routes from and to the same points. In the final analysis the combination rates effectively prohibit the use of complainant's line as a through route for transcontinental traffic. In *Virginian Ry. Co.* v. *United States, supra,* the Supreme Court distinguishes between a route commercially closed and one legally closed."

In *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 71 L. Ed. 463, cited by the Commission, this Court held that a route was closed commercially, although same was physically open, because there were no through joint rates and the applicable combination of local rates was so high as to be prohibitive. The Court said (660-661):

> "Some of the fifty-four made complaint to the Interstate Commerce Commission that they are denied access to the western markets; and sought relief under both section 1 and section 3 of the Act to Regulate Commerce. For most of these fifty-four mines access to these markets was and is physically possible through a junction of the Virginian and the Chesapeake & Ohio. But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these fifty-four mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive."

Whether an interpretation should be adopted which would result in the commercial closing of numerous routes which had been long in existence and which would remain open under another permissible interpretation was certainly an administrative question requiring serious consideration by the Commission.

This is so because the right to use other tariff provisions depends upon whether the route of movement may be through a given intermediate point. Among

such other tariff provisions are those providing for stoppage in transit, for grading, drying, surfacing and other treatment and providing for reconsignment in transit. Thus a purchaser of lumber at Laurel, Miss., for shipment to Columbus, Ohio, may wish to stop the shipment at Louisville, Ky., where he has a plant, for drying and other treatment, and the through joint rate may not apply via Louisville, although combination rates, which, treated by the Combination Rule which would not exceed the through joint rate via another route, may be in effect via Louisville. Under the interpretation insisted upon by the carriers this route would be commercially closed although, prior to the general increases which gave rise to the Combination Rule, the route was open and in common use. Such considerations as these are "generally unfamiliar to a judicial tribunal but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages" of transportation. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485, 76 L. Ed. 408, 414.

It will be seen from the foregoing that the interpretation of the rule here involves the consideration of the relation of tariffs one to another. In *Davis, D. G.*, v. *Prairie Pipeline Co.*, 298 Fed. 393, the Circuit Court of Appeals for the Eighth Circuit, said (397):

> "The construction of a freight tariff is a question of law, *Great Northern Ry. Co., et al.*, v. *Merchants Elev. Co.*, 259 U. S. 285, 66 L. Ed. 943. The relation, however, of tariffs one to another in a common territory is not entirely a question

> of law, but more in the nature of a mixed question of law and fact. We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

Another administrative question which, under the authority of *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 62 L. Ed. 1221, could only be determined by the Commission, was whether under all the circumstances the carriers were justified in forwarding unrouted shipments via the route over which the joint rate applied when such rate was higher than the rate via the combination routes with the application of the Combination Rule. In the Solum case this Court had before it the question whether preliminary resort to the Commission was necessary where there was involved the question of the reasonableness of the carriers' practice of shipping over the interstate route between two points, rather than the cheaper intrastate route between the same points. The Court held that this question was one that must be determined by the Commission and that resort should not be had to the Court until such determination by the Commission had been made. The Court said (483):

> "The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is un-

> reasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate (Texas & P. R. Co. v. American Tie and Timber Co., 234 U. S. 138, 147, 59 L. Ed. 1255, 1258, etc.)."

It cannot be denied that this question was presented to the Commission in the case at bar and was squarely decided by it, for, after referring to the decision of this Court in the *Solum Case, supra,* the Commission held (R. 48-49):

> "It should be noted that the Supreme Court held that the reasonableness of the use by a carrier of a more expensive route is an administrative question for this commission to determine. The joint rates and routes were usually established with the intent of giving the originating carrier the long haul, and defendants do not contend that the routes over which the joint rates applied were in all instances the shortest routes, or that the routes over which combination rates, as reduced by the combination rule, are sought to be applied were unreasonable routes. *We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."* (Emphasis ours.)

The necessity for the determination of this administrative question by the Commission would alone require original application to the Commission.

The rule is well established that where questions, such as those above set forth, are presented, prelimi-

nary resort must be had to the Commission. While it is true, as stated in *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 291, 66 L. Ed. 943, 946, that "what construction shall be given to a rail road tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute," yet this is only true where such construction does not involve considerations such as those here presented, which do involve administrative functions and experience in the intricate and technical facts and usages of transportation. The Court was careful to point this out in the *Merchants Elevator Case,* from which we have just quoted, where the Court said (292):

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 50 Fed. (2d) 83, Judge Hand, of the United States Circuit Court of Appeals for the Second Circuit, reviews at great length the decisions of this Court on the question of necessity of application to the Commission in matters arising under the Interstate Commerce Act, and concludes (87):

> "It seems evident that the Supreme Court, after first holding in the Abilene Case, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, that prior resort to the Commission must be had where uniformity of rates is affected by the decision of a question of fact, has proceeded far beyond the natural limitations of such a doctrine, and has, in general, insisted upon prior resort to the Commission wherever complicated questions of fact will arise and experience in technical matters is required."

This Court, in reviewing the judgment of the Circuit Court of Appeals for the Fifth Circuit, stated (*U. S. Navigation Co.* v. *Cunard S. S. Co.*, *supra*, 481):

> "The decisions of this Court which deal with the subject under the Interstate Commerce Act are fully reviewed by the court below in an able and carefully drawn opinion."

That case involved the question whether preliminary resort was necessary to the United States Shipping Board in a proceeding to enjoin an alleged combination of steamship lines in violation of the Sherman Anti-trust Act and the Clayton Act. This Court

affirmed the ruling of the Circuit Court of Appeals, that such preliminary application was required and, after referring to the opinion of the court below as above quoted, this Court also reviewed the "illustrative cases" arising under the Interstate Commerce Act, it being held that the Commerce Act and the Shipping Act should have like interpretation, application and effect. It seems unnecessary to repeat the analysis of the decisions as set forth in the Court's opinion, but it seems clear therefrom that a case presenting the administrative and technical questions here involved, which require an application of knowledge arising from training and experience in the intricate and technical facts and usages of transportation, must be submitted to the Commission for its determination before application to the courts can be had. In fact, as will appear under the next heading, this Court has expressly held, in a similar case involving the construction and application of this same rule, that the question "required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use," and that the determination thereof must be left to the Interstate Commerce Commission. *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 238, 239, 75 L. Ed. 999, 1003.

PRELIMINARY APPLICATION TO THE COMMISSION HAVING BEEN NECESSARY, ITS DECISION MUST BE SUSTAINED UNLESS CLEARLY CONTRARY TO LAW.

It would be a vain thing to require that questions, such as that here presented, be first ruled upon by the Interstate Commerce Commission if its conclusions are not to be final unless contrary to law. Moreover, since the reason for requiring such ruling by the Commission before application to the courts is that the determination involves complicated questions of fact requiring experience in technical matters, it follows that the Court should accept the ruling unless it appears the Commission "acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers" (*Standard Oil Co.* v. *U. S., supra,* 240).

This question has been squarely decided by this Court in the case of *Standard Oil Co.* v. *U. S.,* just quoted from. In that case, as here, the question involved was the construction and application of tariffs. In fact, in reading the opinion of the Commission (139 I. C. C. 297), it appears that in one of the cases, there under review, the question was as to the interpretation and application of the Jones or Combination Rule, here involved. There the shipper had brought a proceeding before the Interstate Commerce Commission to recover reparation on the ground that the rates charged were in excess of the lawfully applicable rates. The Court stated (237):

> "The rates assailed before the Commission were those charged according to what is called the 'Kelley Tariff.' Appellant contended that there were in effect specific rates taking precedence which were lower and should have been applied."

The Commission construed the tariffs upon which the shippers relied as being inapplicable and dismissed the complaints. Thereupon the shippers brought a suit in equity against the Interstate Commerce Commission and the railroads seeking to enjoin and annul the order of the Commission and praying that the Commission be directed by order of the Court to grant the prayer of the complaints and to find that petitioners had been overcharged, as claimed. This Court held that the lower court was without jurisdiction because the order of the Commission was negative both in form and effect. This Court, however, proceeded to consider the second question presented, that is, as to the construction placed upon the tariffs by the Commission and held (238, 239):

> "Second. The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated

> and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. Ed. 1128, 1133, 27 S. Ct. 700. And to that body, in the interest of uniformity, the determination must be left."

This Court, after discussing the principle laid down in *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* which is elsewhere discussed in this brief, then stated (240):

> "There being nothing to suggest that the Commission acted arbitrarily and without evidence to support its conclusions, or that it transcended its constitutional or statutory powers (Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 547, 56 L. Ed. 308, 311, 32 S. Ct. 108), it follows that, apart from what is said in support of the ground first above stated, the order of the Commission was not susceptible to review by the courts. Compare Interstate Commerce Commission v. Delaware L. & W. R. Co., 220 U. S. 235, 251, 55 L. Ed. 448, 456, 31 S. Ct. 392; United States v. Louisville & N. R. Co., 235 U. S. 314, 320, 59 L. Ed. 245, 250, 35 S. Ct. 113; East Tennessee V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 27, 45 L. Ed. 719, 729, 21 S. Ct. 516."

As already stated, one of the cases there under review involved the construction and application of the Combination Rule, here at issue. That rule was incorporated in the tariffs of only one of the participating

carriers and although the Commission had held, in *Sligo Iron Store Co.* v. *W. M. Ry. Co.*, 62 I. C. C. 643, 73 I. C. C. 551, that the rule should be applied when incorporated in the tariffs of one railroad, party to the transaction, it here held that since application of the rule would result in absorption of a greater amount by the carrier incorporating the rule than the revenue it received from the transportation, the rule must be held inapplicable. It was this ruling of the Commission that this Court said was not subject to review by the courts because "both cases concern unusually complicated and technical tariff situations, the proper determination of which called for the exercise of the trained judgment of that body of experts 'appointed by law and informed by experience' " (239).

It is respectfully submitted that application of the doctrine of *Standard Oil Co.* v. *U. S.*, *supra,* is conclusive of this cause because under that doctrine, preliminary resort to the Commission was necessary and the conclusion of the Commission is not subject to review since it is not claimed that the Commission acted arbitrarily, or without evidence, or exceeded its constitutional or statutory powers.

THE CONSTRUCTION BY THE COMMISSION SHOULD BE SUSTAINED BECAUSE IT HAS LONG BEEN DECLARED AND APPLIED AND HAS BECOME A SETTLED ADMINISTRATIVE CONSTRUCTION.

The construction by the Commission was first made in 1923 in *Cancellation Rule for Constructing Combination Rates on Lumber Between Southern Points and Ohio and Mississippi Crossings,* 81 I. C. C. 745, where the Commission not only construed the rule as in the case at bar, but declined to permit the carriers to insert the words which they now insist should be read into the rule. This ruling has been consistently followed by the Commission since 1923 and the following are some of the cases where the Commission has so ruled:

Cancellation Rule for Combination Rates, 93 I. C. C. 614;
M'Gowin-Foshee Lumber Co. v. *A. F. & G. Ry. Co.,* 59 I. C. C. 451;
Moore Marshall Lumber Co. v. *N. O. & N. E. R. R.,* 112 I. C. C. 33;
Gunther & Co. v. *L. & N. R. R.,* 112 I. C. C. 387;
Eiler Lumber Co. v. *M. P.,* 161 I. C. C. 415;
Brabston v. *L. & N.,* 176 I. C .C. 421;
Milne Lumber Co. v. *N. Y. C.,* 152 I. C. C. 65;
Held v. *C. C. C. & St. L. Ry.,* 161 I. C. C. 413;
Domestic Hardwoods, Inc. v. *B. & O.,* 168 I. C. C. 753.

The last-named decision of the Commission was upheld by the Circuit Court of Appeals for the District of Columbia, in *B. & O.* v. *Domestic Hardwoods, Inc.,* 65 Fed. (2d) 488, and review was denied by this Court.

It is settled law that an administrative ruling giving a practical interpretation of an ambiguous or doubtful statute will not be disturbed except for the most cogent and weighty reasons where, as here, the ruling has been long adhered to. This principle was declared by this Court in *Logan* v. *Davis,* 233 U. S. 613, 58 L. Ed. 1121, where it said (627):

> "The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute, by the executive department charged with its administration, is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons."

The same rule was declared by this Court in the earlier case of *Brewster* v. *Gage,* 280 U. S. 327, 74 L. Ed. 457, the Court saying (336):

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

In that case the Court referred to the fact that a reversal of such construction "would be likely to produce inconvenience and result in inequality." It is evident that a reversal of the long-established administrative construction, here involved, would likewise produce inconvenience and result in inequality, thereby destroying the uniformity which this Court has said

"is the paramount purpose of the Commerce Act," for here it appears that during the period when the shipments here involved moved, many of the railroads were adhering to the construction placed upon the tariff by the Commission and that in other instances, where they failed so to do, the Commission required restitution. Even as to many of the shipments originally involved in this proceeding restitution has been made. To here depart from the construction so long and so generally applied would create discrimination, not only between shippers but also between carriers.

It is therefore submitted that the settled rule that an administrative construction, long adhered to, will not be disturbed except for the most cogent and weighty reasons has application here and requires that the construction of the Commission be sustained.

THE RULE THAT IN DOUBTFUL CASES, IN THE CONSTRUCTION OF A TARIFF, THE COURT WILL CONSIDER HOW THE RATES CLAIMED WOULD OPERATE AS A MATTER OF JUSTICE REQUIRES THAT THE COMMISSION'S CONSTRUCTION BE SUSTAINED.

In many cases the courts have held that, in construing an ambiguous tariff provision, a court is justified in considering how the rates claimed would operate as a matter of justice. *Davis, D. G.,* v. *Prairie Pipeline Co.* (C. C. A. 8), 298 Fed. 393, 397; *Pillsbury Flour Mills Co.* v. *Great Northern R. Co.* (C. C. A. 8), 25 Fed. (2d) 66, 68, 69; *Hohenberg* v. *Louisville & Nashville R. Co.* (C. C. A. 5), 46 Fed. (2d) 952, 955; *Whee-*

lock, et al., v. *Walsh Fire Clay Products Co.* (C. C. A. 8), 60 Fed. (2d) 415, 418.

Applying this rule here, it is clear that the construction made by the Commission should be sustained. Under that construction the carriers would receive the increases as authorized and the shipper would not only pay no more but could continue to use the combination routes as in the past. Under the construction for which the carriers contend, if the shipper used the combination routes he would, in many instances, pay double increases and if he shipped by the route via which the through rate applied he would be deprived of the use of routes which all agree are reasonable routes. These considerations had great weight with the Commission as may be seen by reading the decisions (81 I. C. C. 745, 93 I. C. C. 614) in which it declined to permit the carriers to amend the tariff to include the words "via any route." We have already pointed out that to now adopt the construction for which the carriers contend would result in discrimination not only as between shippers but as between carriers.

It is therefore respectfully submitted that if the Court applies the rule that consideration should be given to how the tariff would operate as a matter of justice, the construction by the Commission must be sustained.

THE COMMISSION SHOULD BE UPHELD BECAUSE THE TARIFF PROVISION, HERE IN QUESTION, WAS CONTEMPORANEOUSLY CONSTRUED BY ALL INTERESTED PARTIES AS HERE CONSTRUED BY THE COMMISSION.

In the amendment to the petition herein, it is alleged as follows (R. 39):

> "For several years after 1920 the railroads applied the aforesaid 'Combination Rule' to shipments of lumber from the south or where same was not applied they made refunds on presentation of claims. In 1923 the southern roads for the first time, took the position that the rule did not apply in cases where there was a through rate by any route and undertook to amend their tariffs so as to specifically so provide, but the Interstate Commerce Commission declined to permit such amendment, 81 I. C. C. 745 and 93 I. C. C. 614."

On demurrer this allegation must, of course, be taken as true. Moreover, when the carriers undertook to amend the tariffs by inserting the words "via any route" and contended that the amendment to the tariff was merely to clarify the tariff and make certain that which the tariff already provided when properly construed, the Commission, in declining to permit the amendment, said:

> "It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that

> their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. *The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.*" *Cancellation Rule for Combination Rates,* 81 I. C. C. 745, 746. (Italics ours.)

It will be noted that the Commission here states that "both the carriers and shippers have in the past put a different construction on the application of this Combination Rule," that is, a construction different from that for which the amended tariffs provided, which was to confine the application of the rule to cases where there was no through joint rate *via any route.*

Later, in the same opinion, the Commission reiterated the statement as to the contemporaneous construction in the following language (748):

> "Protestants further maintain that the language of the rule in the Jones tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there is a joint through rate in effect over the route of movement. This, in our opinion, has been the generally accepted interpretation of the rule, and much traffic has moved over the so-called unau-

> thorized routes under this interpretation since the inception of the rule."

It will be noted that the Commission not only points out that the generally accepted interpretation of the rule has been that rates constructed thereunder are invariably applicable unless there is a joint through rate in effect over the route of movement, but also shows that much traffic had moved over the combination routes under this interpretation since the inception of the rule.

It therefore appears that the contemporaneous construction of all interested parties was in accord with the construction here made by the Commission, and for which we contend. It is necessary to cite only a few cases showing the weight to be given to the contemporaneous construction of documents by the parties thereto.

In *Union Wire Rope Corp.* v. *A. T. & S. F. Ry. Co.*, 66 Fed. (2d) 965, it is recognized that a promulgated tariff partakes of the nature of a contract; and, as pointed out in *Updike Grain Co.* v. *C. & N. W. Ry.*, 35 Fed. (2d) 486:

> "While there may be some rules of construction peculiarly applicable to a railroad tariff, yet ordinarily the rules governing the construction of other documents have been applied by the courts to such tariffs" (487).

The universal rule as to the weight of contemporaneous construction of ambiguous documents was stated

by this Court in *District of Columbia* v. *Gallaher,* 124 U. S. 505, 31 L. Ed. 526, as follows:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

And in *Michigan Home Colony* v. *Tabor,* 141 Fed. 332:

> "These facts, without more, show that the parties construed the covenants of their contract to be mutual and dependent. If the literal meaning of the covenants in question were in doubt, the practical construction which was put upon them by the parties must prevail" (337).

And in *Manhattan Life Insurance Co.* v. *Wright,* 126 Fed. 82:

> "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors" (87).

ANY AMBIGUITY OR DOUBT AS TO THE MEANING OF THE TARIFF IN QUESTION MUST BE RESOLVED AGAINST THE CARRIERS.

Tariffs are, of course, written by the carriers. The general rule that in construing written instruments all ambiguities or reasonable doubts as to their meaning is to be resolved against the maker of the instrument, has particular application to railroad tariffs. In *Union Wire Rope Corp.* v. *A. T. & S. F. Ry. Co.*, C. C. A. 8th Circuit, *supra,* the Court stated the rule and gave the reasons therefor, as follows:

> "A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects, the only contract between the two allowed by law. Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. Not only is this simply an application of the general rule as to construction of written contracts and instruments, but, when the place occupied by transportation and the situation of shippers are considered, it is particularly useful in application to tariffs" (966, 967).

In *United States* v. *Gulf Refining Co.,* 268 U. S. 543, 69 L. Ed. 1082, this Court applied the rule for con-

struing ambiguous tariffs against the railroad and stated "where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates" (547).

In *Atlantic Coast Line Co.* v. *Atlantic Bridge Co.*, 57 Fed. (2d) 654, the Circuit Court of Appeals for the Fifth Circuit, stated the rule in the following forceful language:

> "The Commission and the District Judge took the broader view of the reference. We think they were right. Tariffs, like statutes, have the force of law; like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. Swift v. U. S. (C. C. A.), 255 F. 291. They may not be contrived in catch-penny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. Southern Pac. v. Lothrop (C. C. A.), 15 F. (2d) 486; American Ry. Express Co. v. Price Bros. (C. C. A.), 54 F. (2d) 67; United States v. Gulf Refining Co., 268 U. S. 543, 45 S. Ct. 597, 69 L. Ed. 1082. That the articles in question here consist of machinery, which, though not classified as such under Southern classification, item 'Machinery and Machines,' were by that classification rated sixth class, and therefore come under the general terms of reference used in the exception, unless they can be specifically limited as the carrier contends, is perfectly clear; in fact, no one denies it. It is equally clear that a carrier may not, under a tariff couched

> in general terms, which, if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune" (655, 656).

While carriers do not question the validity of this rule, yet they urge that there is no ambiguity or uncertainty as to the meaning of the tariff provision here in question, and the courts below concurred in this view. This view is clearly untenable when the facts of this case are considered. As shown by the Commission's original decision in this case, which is filed as a part of the amended petition herein, the carriers admit (R. 47) that the "published through rate" must apply over the line of the initial carrier of the route used, and they thereby admit that something in addition to the words used must be read into the tariff. Not only this, but when the carriers applied to the Commission for permission to amend the tariff in question by adding the words "via any route" they thereby admitted that the tariff, as written, was ambiguous, and it was necessary to clarify its meaning.

Petitioners have likewise insisted that there is no ambiguity in the tariff rule in question and that it plainly means just what the Interstate Commerce Commission has construed it to mean. This contention is predicated upon the usage of applying rates to the movement involved and construing all tariff rates as having application to the service performed

rather than to some other service. It finds support in the contemporaneous construction of both shippers and carriers. Commissioner Woodlock based his reluctant concurrence in the original opinion of the Commission herein, in 142 I. C. C. 521, upon the fact that there was no real ambiguity and the rule plainly must be applied to the route of movement. In this connection he said (R. 51):

> "There is no real ambiguity in the tariffs (notwithstanding reference thereto in the report) and the tariffs have the effect of law. We have no option in the matter. For that reason I am compelled to accept this report."

However, that there is ambiguity would seem to be established by the history of the litigation arising out of the application of the rule and by the fact that two Circuit Courts of Appeal have reached diametrically opposite conclusions as to the proper construction thereof.

If there be ambiguity we submit that established rules of construction require that the ambiguity be resolved against the makers of the tariff.

RESPONSE TO THE DEFENDANTS' PLEA THAT THE "COMBINATION RULE" CANNOT BE APPLIED OVER ROUTES WHERE SUCH APPLICATION WOULD RESULT IN A VIOLATION OF THE LONG-AND-SHORT HAUL PROVISION OF THE ACT.

By amended answer (R. 60-61) the defendants pled that in some instances the application of the Combination Rule would result in a violation of the 4th Section of the Interstate Commerce Act, as amended, known as the "long-and-short provision," which prohibits the charging of a greater sum for shorter than for a longer distance over the same line or route (U. S. C. A. Title 49, Section 4). This contention was earnestly pressed in both the District Court and the Circuit Court of Appeals, and great reliance was placed on the case of *Great Northern R. R. Co.* v. *Delmar,* 283 U. S. 686, 75 L. Ed. 1349, but neither of the courts below based their decision on this plea or even referred to it. It is not claimed that such violation of the 4th Section would result here as to most of the shipments involved and only two illustrations of such result were pled. The contention is, however, that because the application of the rule, as construed by the Commission, would result in some instances in violation of the 4th Section that no such construction is lawful in any instance.

In the *Delmar Case, supra,* the question was as to the route over which a through joint rate applied which was published without naming or restricting any routes, one of the possible routes involving a violation

of the 4th Section of the Act and the other being free from such violation.

This Court held that under these circumstances the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of the law should be applied, and that the tariff should be construed as applying only to the shorter route as to which there was no violation. Here it is admitted that the combination routes are direct reasonable routes. The combination rates are composed of separate specific rates which it is assumed do not individually violate the 4th Section. If the application of the Combination Rule results in 4th Section violations in cases where there is a joint through rate from the same point of origin, it would necessarily result in a like violation in instances where there is no joint through rate from the point of origin, in which instance the carriers admit the Combination Rule applies. Thus the contention of the carriers would destroy the rule in its entirety and there would be nothing left to construe. However, even should the Court conclude that the rule should not be applied in any instance where it would result in a violation of the 4th Section and that the shippers so situated must suffer the double increases, this would be no reason for failure to apply the rule in those instances where no such violation does result.

In *Chicago Great Western Railroad* v. *Farmers Shipping Ass'n,* 59 Fed. (2d) 657, a situation was presented where either construction of the tariff would

result in violations of the 4th Section, just as is the case here, and the Court stated:

> "Counsel for the Association also urges that to adopt the construction contended for by the Railroad Company will result in a violation of the long and short haul provisions of section 4 of the Interstate Commerce Act (24 Stat. 379, 380, sec. 4, as amended by 36 Stat. 539, 547, sec. 8, and 41 Stat. 456, 480, sec. 406 (49 U. S. C. A. sec. 4)). This argument is of little force because either construction will result in a violation. It will be noted that in Item 735-A, Lindwerm is nearer to the Missouri River points than is Granville, and the rate to Lindwerm is 23.5 and the rate to Granville is 16. The tariff on its face violates section 4 and to construe it to apply to stations intermediate to the Missouri River points and the points in the group north and west of Chicago will simply increase that violation". (659, 660).

In the case of *Beaumont, Sour Lake & Western* v. *Magnolia Provision Co.*, 26 Fed. (2d) 72, the question as to whether the fact that the published rate violated the 4th Section rendered the rate invalid, was squarely presented, and the Court held that the published rate must be assessed notwithstanding such violation. There the carrier had published a rate of 23 cents per 100 pounds on tin cans from New Orleans to Houston, Texas. The rate was published by mistake as the carriers had intended to continue in force the pre-existing rate of 70 cents. The 70-cent rate was collected and the shipper sued to recover to the basis of the published

rate of 23 cents. The carriers defended both on the ground of mistake and on the ground that the 23-cent rate violated the long-and-short-haul clause of the Interstate Commerce Act, because it was less than the rate to intermediate points over the same route, and the Court said (73):

> "In Lamb-Fish Lumber Co. v. Y. & M. V. R. R. Co., 42 I. C. C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in Davis v. Portland Seed Co., 264 U. S. 403, 424, 44 S. Ct. 380, 68 L. Ed. 762. The carriers cannot defend by showing that published rates, if enforced, would violate the long and short haul clause and subject them to penalties. Such a showing would only be evidence of intention indicating that a mistake was made. Because of the policy of the law, the rate must be abided by as long as it is included in published schedules of rates. The remedy of the carriers is to apply to the Interstate Commerce Commission to have the rate changed. The judgments are affirmed."

The rule as construed by the carriers, however, would we believe, be clearly unlawful because of the violation of Section 6 of the Interstate Commerce Act as amended (U. S. C. A., Title 49, Section 6), Section 1 of which provides as follows:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. The provi-

sions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

The Commission, in *Cancellation Rule for Constructing Combination Rates on Lumber between Southern Points and Ohio and Mississippi River Crossings,* 93 I. C. C. 614 (the case where the defendants tried to add the words "via any route" to the Combination Rule), held that the rule, so worded, would violate this section, saying (615):

> "Another serious objection to the tariff provision proposed is that it does not fully conform to the requirements of section 6 of the interstate commerce act in that the restriction proposed makes necessary a search of other tariffs in order to determine whether there are joint rates over any route before it can be determined whether the rule is applicable."

It thus appears that while the rule, as construed by the Commission, might in some instances result in 4th Section violations, just as it would if construed as contended by the carriers, yet in all instances the latter construction would result in violation of Section 6. Under these circumstances we submit the fact that the construction made by the Commission may result, in some instances, in a violation of Section 4 is no reason for rejecting that construction and substituting a construction which would result in violation of both Section 4 and Section 6.

THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, IN *B. & O. R. R. CO.* v. *DOMESTIC HARDWOODS, INC.*, 65 FED. (2d) 488, IS SOUND AND SHOULD BE SUSTAINED.

The question involved in this case was passed upon by the Circuit Court of Appeals of the District of Columbia, in *B. & O. R. R. Co.* v. *Domestic Hardwoods, Inc., supra,* and the construction made by the Commission was sustained. The direct conflict between that decision and the decision of the Circuit Court of Appeals for the Sixth Circuit herein was the principal ground urged in the application for the writ of certiorari here. We think the reasoning of the Circuit Court of Appeals for the District of Columbia is unanswerable and quote therefrom, as follows (491, 492):

> "It is admitted here that, if the Jones rule does apply, there was an overcharge. It is equally admitted that, if the proviso that the rule should not apply where there is a joint rate is applicable, there is no overcharge. The single question in this aspect of the case, therefore, is whether the construction of the language of the proviso by the Commission is correct. The position that the carriers take is that the Jones rule is applicable only where there is no joint through rate via any route. This the Commission held was not the correct interpretation, and we find ourselves in agreement with this conclusion, though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would pre-

sent more difficulty, for the language is undoubtedly broad enough to be construed as contended by carriers. *But it should be remembered that the question involves more than the mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court. But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural.*" (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit, in reaching a contrary conclusion, stated that it was "unable to follow the reasoning of the District Court of Appeals of the District of Columbia to its conclusion" (97). In rejecting the reasoning of the Circuit Court of Appeals of the District of Columbia, the Court below stated (97):

> "Even so, the court recognized that it would have had no great difficulty in accepting the carriers' view were it not upon a question as to which the Commission had made a ruling, and it followed the Commission's ruling on the theory that the question involved a technical subject, as to which the Commission is presumed to have expert knowledge superior to that of the court. We perceive, however, no inherent technical question in determining whether the rule means what it says, and so find no occasion for adding to it a limitation which is nowhere implied and which no exigency requires."

From this it appears that the Court below based its decision, in part at least, upon the conclusion that there was no inherent technical question involved since elsewhere the Court states (95):

> "The first question to be determined is the conclusiveness of the Commission's awards. If the question were one of fact, or involved the exercise of administrative discretion, we are bound by the decision. The Commission, however, was asked to construe a railroad freight tariff. No question was before it as to the reasonableness of rates, and while existence of through routes was involved, there was no controversy as to the fact, and no question decided as to the reasonableness of the routes. The question was one of law, and while great deference will be paid to the Commission's conclusions, we are not bound by them. Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 99; U. S. v. Missouri Pacific R. Co., 278 U. S. 269, 280. The problem of ascertaining the proper interpretation to be given to a tariff provision is akin to that to be given any other document. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291."

From a comparison of the two opinions it fairly appears that the difference in the conclusions reached arises principally from the fact that the Circuit Court of Appeals of the District of Columbia concluded that the "question involves more than a mere interpretation of words—it really goes to the interpretation and construction of railroad rates and routings, which is a

technical subject and as to which the Commission is presumed to have, and doubtless has, expert knowledge superior to that possessed by a court," while the Court below held that no technical question or question of fact was involved and that the question was solely one of law as to the meaning of words. We have undertaken to demonstrate that the question here was one requiring action by the Commission since it presented administrative and technical questions involving rates and routings, the relation of tariffs one to another, which necessitate the application of knowledge arising from training and experience in the intricate and technical facts and usages of transportation. But aside from this question the two Courts are in sharp disagreement in their own interpretation of the tariff. The Circuit Court of Appeals for the District of Columbia, after referring to the weight to be given to the Commission's construction, states:

> "But, considered otherwise, we do not think the construction placed by the Commission on the proviso is strained, unreasonable, or unnatural" (492).

On the other hand, the Court below held that there was no ambiguity in the rule and no occasion for construction; that it was so clear that neither the practical construction of the parties, nor the construction of the Commission, nor the historical background which gave rise to the rule could be permitted to defeat its plain meaning as found by the Court. This notwithstanding

the long controversy over the proper construction and the fact that both the Commission and another United States Circuit Court of Appeals had ruled to the contrary.

THE CASES OF *HOHENBERG* v. *L. & N.* (C. C. A, 5), 46 FED. (2d) 952, AND *WHEELOCK, ET AL.*, v. *WALSH FIRE CLAY PRODUCTS CO.* (C. C. A. 8), 60 FED. (2d) 415, RELIED UPON BY RESPONDENTS, ARE NOT IN POINT HERE.

In respondents' brief in opposition to the granting of the writ herein, reliance is had upon the above-styled cases, and it is stated that "these two decisions show that the decision of the Circuit Court of Appeals in the case at bar is right and the decision of the Court of Appeals of the District of Columbia is wrong."

An examination of these cases will show that they have no bearing whatever upon the issue here. True, they involve the application of the Combination Rule, but in a wholly different situation than here presented. In each of these cases only the tariff of the initial carrier incorporated the Combination Rule by reference. Here it is admitted that the rule was incorporated in tariffs of all the carriers. The question there was whether the incorporation of the rule by one carrier was sufficient to make the rule applicable to the entire movement where it was not a part of the tariff of connecting carriers, parties to the movement. This was clearly a question of law involving no question of fact or administrative policy. The Commission held that

the initial carrier, having incorporated the rule in its tariff, should protect same on the through movement. In each case, however, the Court held that whether the rule applied by carriers whose tariff did not include the rule, was a question of law and as such must be decided in the negative. In the *Wheelock case, supra,* the Court pointed out that the rule could not be made applicable to a carrier whose tariffs did not include it and that to put the entire burden upon the initial carrier of protecting the rate resulting from application of the rule, would work injustice, the Court saying (418):

> "As said by this court in Davis v. Prairie Pipeline Co., 298 F. 393, 397, '* * * A court is warranted in considering how the rates claimed as applicable would operate as a matter of justice in getting at the railroad's intention with relation to the tariffs.'
>
> "It would seem clear that the Jones' combination rule was not intended to be applied unless all factors of the combination were subject to that tariff. In the instant case, where only the initial factor was subject to the rule, the other participating carriers are entitled and required to charge and collect their tariff rates unaffected by the rule, and this would place the entire reduction upon the initial carrier because the other carriers did not participate in the infliction of any wrong and are not joint tort-feasors. The effect of the judgment here was to reduce, in instances where the rate was made of two factors, the $1.65 rate from Vandalia, Mo., to Evansville, Ind., as speci-

> fied in Speiden's Tariff, to $1.15, and, in the event the rate is made up of three factors, this $1.65 rate is reduced to 65 cents. It would therefore result that the initial carrier in this case would collect and receive neither the rate named in the Speiden Tariff, nor that rate as modified by the Jones Tariff. In other words, it would collect a rate justified by no published tariff."

It will thus be seen that these cases are in no way in point here except as they declare the rule that the Court is warranted in considering how the rates claimed as applicable would operate as a matter of justice.

CONCLUSION.

It is submitted that the Interstate Commerce Commission had exclusive jurisdiction of this cause to determine the construction and application of the tariff in question, and that its determination is not subject to review since it is not claimed that the Commission acted arbitrarily, or without evidence, or exceeded its constitutional or statutory powers, and that the case of *Standard Oil Co.* v. *U. S., supra,* is conclusive of this case.

It is further submitted that aside from the conclusive character of the Commission's determination, for all of the foregoing reasons the tariff was correctly construed by the Commission.

It is therefore respectfully urged that the finding of the Interstate Commerce Commission be upheld; that the decree of the Circuit Court of Appeals for the

Sixth Circuit be reversed, and the case be remanded with directions that the demurrer to the petition, as amended, be overruled, and the demurrer to the answer, as amended, be sustained.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at:
Louisville, Ky.,
November 23, 1936.

APPENDIX.

STATUTES RELIED ON.

Sec. 16. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, February 28, 1920, June 7, 1924, and August 9, 1935*) (*U. S. Code, title 49, sec. 16.*) (1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Sec. 9. (*As amended August 9, 1935.*) (*U. S. Code, title 49, sec. 9.*) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 4. (*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*) (*U. S. Code, title 49, sec. 4.*) (1) That it shall be unlawful for any common carrier subject to the provisions of this part to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, but this shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensa-

tion for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a mort direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this mandatory part by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

Sec. 6. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*) (*U. S. Code, title 49, sec. 6.*) (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its

own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation; in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.